Supreme Court, U.S.
FILED
JUL 17 2009
OFFICE OF THE CLERK

No. 08-1414

IN THE

Supreme Court of the United States

L.M.,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Procedural and Substantive History

This matter arises under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. §§ 1400 *et seq.* [1] It began on March 28, 2006, with a decision issued by an Administrative Law Judge ("ALJ") with the California Office of Administrative Hearings ("OAH"), following a four-day administrative hearing. ("OAH Decision") Pet. App. 61a – 101a. Dissatisfied with the OAH Decision, Petitioners appealed to the U.S. District Court, Central District of California, which reversed the OAH Decision as to the issue raised by Petitioners here. Pet. App. 42a – 60a. ("District Court Order"). Respondent Capistrano Unified School District timely appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit found that the district court had committed clear error in two related respects in its reversal of the OAH Decision: (1) the lower court had applied an incorrect legal standard regarding a procedural violation of the IDEA that had been carefully analyzed and found by the ALJ to have been "harmless" under the specific facts of this case; and, (2) in so doing, the district court had ignored the evidence developed

[1] The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2647, which took effect on July 1, 2005. Unless otherwise noted, all citations are to the statute and regulations in effect at the time of the events in question, all of which pre-dated the effective date of the 2004 amendment to the IDEA. *See Adams v. Oregon*, 195 F.3d 1141, 1148 n.2 (9th Cir. 1999).

through the administrative hearing. *L.M. v. Capistrano Unified School District*, 556 F.3d 900 (9th Cir. 2009). Pet. App. 1a – 30a.

The Court of Appeals specifically found the district court's ruling directly contrary to controlling legal authority because that court had failed to analyze any facts regarding the effect of the procedural violation, all of which facts were considered and rightly analyzed by OAH. The lower court had also failed to employ the correct legal standard under the IDEA in cases such as this, in which procedural violations of the Act do not prejudice a student's educational rights, or parents' right to participate in their children's educational decision-making. *See, e.g., R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007) ["A procedural violation does not constitute a denial of a [free and appropriate public education] FAPE if the violation fails to "result in a loss of educational opportunity[.]"· *See also, Amanda Ford v. Long Beach Unified Board of Education* 291 F.3d 1086, 1089 (9th Cir. 2002), citing *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992); *Amanda J. v. Clark County Sch. Dist.* 267 F.3d 877, 892 (9th Cir. 2001.)

In the OAH Decision, the ALJ had applied the appropriate legal analysis regarding procedural violations under the IDEA:

> In the *Rowley* opinion, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not

> automatically require a finding of a denial of a FAPE. *Procedural violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. ML. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 645; *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.

Pet. App. 84a-85a; emphasis added.

The IDEA and controlling authority require first a determination whether a procedural violation has occurred, and then a determination, based on the specific facts of the case, whether significant prejudice to student or parent rights had resulted. The district court undertook only the first step in this required two-step analysis, and the Court of Appeals properly reversed on this ground. The district court's error was made most clear in its statement that, "the ultimate issue" is "whether a procedural violation of the IDEA occurred." Pet. App. 54a, n. 1. Under controlling case authority, cited by the ALJ, the existence of a "procedural violation" is not the "ultimate issue," and the appellate court found it to have been clear error for the district court to stop at that point in the analysis. According to the Court of Appeals:

> The district court misconstrued the ALJ's findings, and in doing so, it failed to properly apply the harmless error analysis required by our precedent. Not all procedural flaws result

> in the denial of a FAPE. We have never adopted as precedent the structural defect approach discussed by Judge Alarcon in *M.L. v. Federal Way School District*, 394 F.3d 634 (9th Cir. 2005) (plurality). *See id.* at 652-53 (Gould, J., concurring). Our precedent is clear: a procedural violation may be harmless, and we must consider whether the procedural error either resulted in a loss of educational opportunity or significantly restricted parental participation. [citations omitted.]

Pet. App. 22a-23a.

Petitioners make no explicit challenge to the propriety of this long-standing harmless error analysis, though they implicitly seek to have this Court ignore its applicability.[2] As the OAH Decision and Ninth Circuit Opinion clearly establish, this matter turns on an analysis of the particular and unique facts of the case adjudicated by the ALJ, and proper application of the

[2] This necessary two-step analysis of procedural errors is also codified in California's Education Code as follows:

> In a hearing conducted pursuant to this section, the hearing officer may not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in a loss of an educational opportunity or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individual education program.

Cal. Educ. Code § 56505(j).

harmless error analysis under those specific facts. Thus, not only is the Ninth Circuit Opinion consistent with applicable precedent, but the case-specific nature of the factual analysis in this case also makes this an inappropriate matter for consideration by this Court.

Finally, despite Petitioners' contrary representations, the Ninth Circuit Opinion is also entirely consistent with prior decisions of this Court. For instance, in *Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 525-526 (2007), this Court cited directly to 20 U.S.C. § 1415(f)(3)(E)(ii), codifying the principle that procedural violations must be analyzed to determine if they "impeded the child's right to a free appropriate public education" or "significantly impeded the parents' opportunity to participate in the decisionmaking process." *Winkelman* is, ironically, one of the cases Petitioners rely upon in asserting that the Ninth Circuit Opinion is contrary to this Court's previous decisions. Pet. at 11, 15, 25.

B. Factual Background Regarding Petitioner L.M. and the Issue Under Review.

Petitioner L.M.[3] qualifies for special education services under the category of autism. When L.M. turned age three, in January 2005, the District convened two Individual Educational Program ("IEP") team meetings, including L.M.'s Parents as participants, to develop L.M.'s initial IEP. In these IEP meetings, the District

[3] For ease of reference, the District refers to Petitioner L.M. herein variously as "Student," or "L.M." and refers to Student's parents, Sam M. and Mariette M., collectively as "Parents."

proposed placing L.M. in a classroom setting created specifically for children with autism. After assessing L.M., which assessment was not challenged below, the District concluded that this classroom setting satisfied the IDEA's requirement that all students with special needs be offered a free and appropriate public education ("FAPE"), in the least restrictive environment ("LRE"). Pet. App. 65a-66a.

L.M.'s Parents chose to keep him out of school entirely, attending their privately funded, more restrictive educational environment consisting of a one-to-one in-home program. Months later, after numerous unsuccessful attempts by the District to elicit Parents' response to the IEP offer, the Parents filed their request for a due process hearing under the IDEA seeking to require the District to reimburse them for their preferred instructional program. Pet. App. 66a-67a. As noted by the ALJ, the District communicated several times with Petitioners during February and March 2005 in order to determine their response to the IEPs, but received no response except for the filing of the due process complaint in March 2005. *Id.*

At the February 2006 administrative due process hearing, L.M. challenged the District's procedural and substantive compliance with the IDEA in developing his IEP. The due process hearing lasted four (4) full days, and a total of (12) percipient and expert witnesses testified, including three (3) expert witnesses for Petitioners, each a licensed psychologist, regarding the District's offer of educational placement. Pet. App. 62a. On March 28, 2006, the ALJ upheld the District's offer of classroom placement while finding the District had

committed two procedural errors, one of which the ALJ found constituted a limited denial of FAPE to L.M.

As to the issue resulting in a limited denial of FAPE, the ALJ found the manner in which the District had written its offer of speech-language services to be ambiguous, and that this ambiguity had caused a denial of FAPE to L.M. in that limited area. For this procedural error, regarding which the ALJ properly analyzed the pertinent facts, the ALJ ordered the District to reimburse the Parents for L.M.'s private speech services for the time period covered by the due process hearing. That ruling has not been appealed, and thus is not under review.

The other procedural flaw noted by the ALJ, which the ALJ found to have been harmless under the circumstances, is the issue under review. It involves one of L.M.'s three expert psychologists, Dr. Melanie Lenington, and the District's offer to her of multiple observations of the proposed classroom, to be conducted in 20 minute *increments*, pursuant to District policy designed to minimize extended classroom disruption. While holding that this did not permit a precisely "equivalent" observational opportunity under California Education Code Section 56329(c), the ALJ analyzed the relevant facts, and witness credibility, and found that the specific evidence demonstrated that L.M.'s parents' participatory rights had not been prejudiced. Pet. App. 92a-93a, ["given the particular facts of this case, the procedural violation did not seriously interfere with the parents' right to participate in the IEP process . . ."] This finding by the ALJ was explicitly upheld by the Ninth Circuit, which reversed the district court on this

point, because the district court had, "failed to properly apply the harmless error analysis required by our precedent." Pet. App. 22a – 23a.

Indeed, the evidence demonstrated that the Parents had fully participated in the development of L.M.'s IEP, and testimony by Dr. Lenington herself established that her observation had, in fact, yielded sufficient information for her to form an expert opinion and to adequately advise the Parents. Pet. App. 92a, [indicating that Dr. Lenington, "was still able to develop opinions about the [classroom], advise parents regarding the [classroom], and give informed testimony at the hearing regarding the [classroom]".]

Petitioners' primary claim is that they were not able to obtain adequate expert observations, and thus were prohibited "from obtaining meaningful information about the proposed placement via their expert." Pet. at 26. However, of Petitioners' three expert psychologists (Dr. Melanie Lenington, Dr. Ronald Leaf and Dr. Doreen Granpeesheh) there has never been any claim that either Dr. Leaf or Dr. Granpeesheh were prejudiced in any manner in their preparations for the administrative hearing, and Dr. Lenington's own testimony eliminated this claim under the facts of this case. Pet. App. 62a; 77a-80a. With these facts in hand, the ALJ ruled that the procedural issue did not create any substantive prejudice, and held in the District's favor as to the classroom placement.

L.M. appealed the ALJ's Decision to the district court on several grounds, and, again, alleged procedural and substantive IDEA violations, including the

incremental observation issue. While the ALJ had clearly articulated her factual support and reasoning on this and all issues, the district court, without citation to the material evidence relied upon by the ALJ, and without citation to factually relevant case authority, reversed the ALJ's Decision, and held that the District's application of its observational procedure denied L.M. a FAPE *per se*. Pet. App. 52a-54a. The Court of Appeals found that the district court had committed clear error in failing to address the ALJ's explicit findings regarding the evidence on this issue.

Indeed, the district court clearly failed even to make the necessary analytic distinction, properly made by the ALJ, and later by the Court of Appeals, between "harmless" procedural violations, and such violations which cause a denial of FAPE. The district court seemingly misunderstood the ALJ's holding, as evidenced by the court's statement that, "the Court disagrees with ALJ Brown's conclusion that the time limits placed on Dr. Lenington's observation at [the school] did not constitute a procedural violation." Pet. App. 53a. To the contrary, the ALJ *had* found a procedural violation, but then properly analyzed the relevant factual circumstances. Having found a procedural violation in terms of "equivalency" of observations, the ALJ went on properly to state that, "[t]he next question is whether this procedural violation constitutes a denial of FAPE." Pet. App. 92a.

Further, as also duly recognized by the ALJ, neither the Parents nor any of their expert witnesses including Dr. Lenington believed at any time that L.M. could be educated in *any* classroom environment, rendering

further observation of the proposed classroom essentially incidental to their ultimate opinions. Pet. App. 79a. Having heard all of the testimony, and read all documentary evidence, the ALJ found that no denial of FAPE had occurred on the basis of the observational procedure employed by the District. The district court had articulated no factual or legal basis upon which to undo the ALJ's entire Decision on the basis of this single point, and the Ninth Circuit correctly reversed the lower court on this ground. On this procedural history, and under these facts, there is no rationale for this Court to consider this matter further.

REASONS FOR DENYING THE PETITION

A. Summary of Argument

Supreme Court Rule 10 provides that, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. Petitioners argue that the Ninth Circuit Opinion, "violates the letter and spirit of the IDEA and disregards this Court's rulings with respect to procedural due process under IDEA." Pet. App. 31. In fact, Petitioners seek reversal of the Ninth Circuit Opinion because they are dissatisfied with the Court of Appeals' deference to the trier-of-fact's factual and credibility determinations formed during the due process hearing.

Petitioners do not assert that there is any conflict among the various Circuit Courts of Appeals on application of the two-part procedural issue analysis, and

indeed there is no conflict.[4] The issue under review by the Ninth Circuit was the entirely non-controversial question: Whether the IDEA requires a two-step analysis of procedural violations, to determine if there was a substantive prejudice to educational or participatory rights as a result of the procedural violation. The answer, equally non-controversial, is "yes." The Court of Appeals, following well-established authority, found that the two-step analysis is required,

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[4] *See, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (en banc) ["Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits."]; *G. N. ex rel. J.N. v. Bd. of Educ.*, 309 Fed. Appx. 542, 545-546 (3rd Cir. 2009; unpublished decision) [holding that a procedural violation is actionable only if that violation prejudices a student's educational or parents' participatory rights or, "causes a deprivation of benefits."]; *Dibuo v. Bd. of Educ.*, 309 F.3d 184, 190; (4th Cir. 2002) [holding similarly that the "harmless error" analysis applies in the 4th Circuit]; *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811-812 (5th Cir. 2003) [establishing the "harmless error" test in the 5th Circuit]; *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007) ["A procedural violation does not constitute a denial of a FAPE if the violation fails to "result[ ] in a loss of educational opportunity[.]"]; *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008) "[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE."]; *Weiss by & Through Weiss v. School Bd.*, 141 F.3d 990, 994 (11th Cir. 1998); ["In evaluating whether a procedural defect has deprived a student of a FAPE, the Court must consider the impact of the procedural defect, and not merely the defect per se."]

conducted that analysis given the unique facts of this case, and reversed the district court which had erroneously failed to do so.

As the sole ground for review by this Court, Petitioners assert that the Ninth Circuit Opinion conflicts, "with this Court's prior rulings concerning IDEA." Petition at i. More specifically, Petitioners assert that the Ninth Circuit Opinion conflicts with this Court's holdings in *Schaffer v. Weast*, 546 U.S. 49 (2005), as well as with *School Committee of the Town of Burlington v. Massachusetts*, 471 U.S. 359 (1985), and *Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516 (2007). Petitioners insist, for instance, that the Ninth Circuit Opinion is somehow at odds with the determination in *Schaffer* that petitioners under the IDEA bear the burden of persuasion in actions under the Act. Petitioners assert that in light of this determination all petitioners should (though implicitly did not here) have experts, "with the firepower to match the opposition." Petition at 16. There is, however, no conflict whatsoever between the Ninth Circuit Opinion and *Schaffer*, or any other decision of this Court, and thus no grounds for granting the Petition in this matter.

Indeed, the OAH Decision (and the Ninth Circuit's re-affirmation of that Decision) was premised explicitly upon the undisputed factual evidence that, while Dr. Lenington, just one of Petitioners' three expert licensed psychologists, "would have preferred to observe for the full 90 minutes, she was still able to develop opinions about the SDC, advise the parents regarding the SDC, and give informed testimony at the hearing regarding the SDC." Pet. App. 92a. Moreover, there is

no claim here, nor at any level in the prior proceedings, that Petitioners' other expert licensed psychologists sought, or were denied, access to the classroom offered in the District's IEP. Thus, the OAH Decision took into account precisely the principle upon which Petitioners insist, that each side should have duly informed expert witnesses. Each side, in fact, did have duly informed expert witnesses, and the matter was resolved based upon the trier-of-fact's specific factual and credibility determinations.

Neither Dr. Lenington nor any other of Petitioners' experts testified that they had not been able to develop adequate opinions, or to consult with their clients. It is thus undisputed that Petitioners' experts themselves did not feel their opinions had been prejudiced under these facts. The Ninth Circuit relied upon the undisputed testimony of Dr. Lenington to this effect, stating with approval that, "the ALJ noted that Dr. Lenington admitted during her testimony that she 'was still able to develop opinions about the [Palisade program], advise the parents regarding [Palisade] and give informed testimony at the hearing regarding the [Palisade program].' " Pet. App. 16a.

The ALJ listened to the testimony of each of Petitioners' three licensed psychologists, and all of the other witnesses, and concluded as she did, and it is inappropriate to seek to reargue these factual claims at this point, before this body. Moreover, Petitioners expend nine (9) full pages of their Petition explicating selected medical and educational issues, using secondary materials, involving students with autism in general terms, in a plain attempt to reargue the merits of their

own three experts' positions. Petition 17-26. None of this material has any bearing on whether this case is appropriate for review by this Court.

B. The Ninth Circuit Opinion Does Not Conflict In Any Manner With Prior Decisions Of This Court Nor With Well-Established Circuit Court Precedent.

The purpose of the IDEA is to provide special education services for children with qualifying disabilities. 20 U.S.C. § 1400(d)(1)(A). To this end, the IDEA requires the provision of a FAPE to each child, defined at 20 U.S.C. § 1415(b). The IDEA is satisfied if an "individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits." *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031 (9th Cir. 2006), quoting *Amanda J v. Clark County Sch. Dist.*, 267 F.3d 877, 890, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

Further, as Petitioners note, "[t]he Act imposes extensive procedural requirements upon States receiving federal funds under its provisions[,]" and requires that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. *Rowley*, 458 U.S. at 182. The parents' right to participate in the IEP process includes the right to have the parents' independent expert observe the proposed

placement. *Benjamin G. v. Special Education Hearing Office*, 131 Cal. App. 4th 875 (2005).

Petitioners rely most heavily upon *Schaffer v. Weast*, 546 U.S. 49 (2005), *School Committee of the Town of Burlington v. Massachusetts*, 471 U.S. 359 (1985), and *Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516 (2007) in support of their assertion that the Ninth Circuit Opinion is in conflict on the "important questions of federal law" addressed by this Court in IDEA cases. Petitioners correctly note that the IDEA is designed to provide procedural safeguards to students and their parents in connection with the development of IEPs for students with disabilities, and to resolve disputes over the development and terms of those IEPs. However, neither *Schaffer* nor any of the other decisions of this Court cited by Petitioners require different reasoning, or different outcome than the reasoning and outcome enunciated by the Court of Appeals.

In particular, in *Winkelman*, this Court explicitly set forth the two-part analysis to be applied in addressing allegations of procedural violations of the IDEA. *Winkelman*, 550 U.S. at 525-526. Petitioners make no mention of this aspect of the *Winkelman* decision, and they likewise do not directly address the central issue in this matter at any point in their Petition. Petitioners simply state, without reference to the actual findings of the ALJ or the Circuit Court, that Respondent, "prohibited Parents from obtaining meaningful information about the proposed placement via their expert." Pet. at 26. The Ninth Circuit Opinion addresses this claim directly, though Petitioners ignore

this and attempt to reargue the abstract claim that there was somehow a *per se* violation of the IDEA in this case.

Like *Winkelman*, this Court's decision in *Schaffer* requires no outcome different than that issued by the Ninth Circuit. *Schaffer* stands for the simple proposition that the petitioner in a due process hearing under the IDEA bears the burden of persuasion. *Schaffer*, 546 U.S. at 62. While it is non-controversial that the procedural safeguards of the IDEA are in place for the protection of disabled students and their parents, it is equally non-controversial that the "harmless error" test must be applied in analysis of allegations of procedural violations of the IDEA. Thus, the outcome at the Ninth Circuit is not an appropriate matter to bring before this Court as each of these matters is non-controversial, and the outcome turns only on application of clear and unambiguous law to facts that at this point are undisputed.

In tangential connection with their claim that the Ninth Circuit Opinion is at odds with decisions of this Court, Petitioners also cite an administrative hearing decision from New Jersey. Pet. App. 104a – 123a, appending, *S.B. and K.B. on Behalf of P.B. v. Park Ridge Board of Education*, AOL DKT. NO. EDS 13813-08. That case is entirely inapposite, as there the school district ultimately refused to permit any observation whatsoever of a proposed educational placement, despite an express order of the state administrative body to permit such observation. Pet. App. 105a.

The parents there had made a motion to compel discovery which was granted by the ALJ, who ordered the school district to make the proposed placement available for observation. This Order was not followed by the school district, the parents' experts never observed the placement, and the district was sanctioned as a result. Further, in that case, the ALJ himself applied the two-part analysis that the district court here failed to undertake. Pet. App. 117a. In *S.B.*, the expert for petitioners was thus never permitted any opportunity to observe the proposed placement, and responsibility for that complete lack of opportunity was placed upon respondent school district. Pet. App. 123a. By way of contrast, here not only did Dr. Lenington testify regarding the adequacy of her observation, but Petitioners' two other licensed psychologist experts made no complaints about their abilities to prepare for the case, and to formulate opinions as to the classroom placement.

The *S.B.* case is similar to *Benjamin G v. Special Education Hearing Office,* 131 Cal.App.4th 875, a case relied upon by Petitioners below, and by the district court in its erroneous reversal of the OAH Decision. See, Pet. App. 53a. In *Benjamin G.*, as in *S.B.*, the parents had been denied any opportunity whatsoever to have their expert witness observe the classroom proposed for their child. The school district in that case had declined to permit the observation based on its interpretation of California Education Code Section 56329(c) which it contended permitted such observations only in conjunction with parental requests for independent educational evaluations.

Thus, the school district there refused to permit the parents' expert witness to observe the classroom at all. *Benjamin G.*, 131 Cal.App.4th at 879. The California Court of Appeal rejected the school district's narrow interpretation of the Education Code, and required the district to permit observation by the parents' expert. *Id.* at 884. In that case, therefore, as in *S.B.*, and distinguished from the present case, there was no development of facts such as those reviewed and analyzed by the ALJ here, supporting the conclusion that the length of Dr. Lenington's observation was not prejudicial to her ability to provide her expert opinion.

Additionally, in *Benjamin G.*, the parents had made a motion to compel an observation of the classroom placement as a means of preparing their expert to testify at the due process hearing. That motion was denied by the ALJ there, and by the lower state court, and that denial constituted the basis for the appeal in that case. In contrast, Petitioners do not cite to any such motion they made below to compel any further observation by Dr. Lenington, nor by any other expert witness retained by Student's Parents.

CONCLUSION

Petitioners have not stated any sufficient grounds for further consideration of this matter by this Court. There is no conflict among Circuit Courts of Appeals, and no conflict between the Ninth Circuit Opinion and this Court's prior rulings. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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